Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

**No. 75-839**

ROBERT P. WHALEN, as Commissioner of Health of the State of New York,

*Appellant,*

—against—

RICHARD ROE, an infant by ROBERT ROE, his parent; JOHN DOE, an infant by MARY DOE, his parent, JAMES MOE, an infant by MICHAEL MOE, his parent; JANE POE, MATTHEW T. BRODY, ISRAEL L. SCHMIERER and EMPIRE STATE PHYSICIANS GUILD, INC.,

*Appellees,*

—and—

GEORGE PATIENT, MARTHA PATIENT, GERALD L. LUSTIG and THE AMERICAN FEDERATION OF PHYSICIANS AND DENTISTS,

*Intervenor-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

## APPELLEES' MOTION TO AFFIRM

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## APPELLEES' MOTION TO AFFIRM

### Statement

Appellees Richard Roe, John Doe, James Moe, Jane Poe, Matthew T. Brody, Israel L. Schmierer and Empire State Physicians Guild, Inc., pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the final order and judgment of the District Court be affirmed on the ground that the contentions attempting to support the constitutionality of the challenged statutory provisions are so unsubstantial as not to warrant further argument.

## Question Presented

Whether the Court below correctly held that Sections 3331(6), 3332(2) and 3333(4) of the New York Public Health Law, to the extent that they require automatic routine and massive reporting to the State of the names, addresses and ages of all patients who receive treatments by Schedule II controlled substances, unconstitutionally interfere with plaintiffs' rights of privacy guaranteed under the Fourteenth Amendment.

## Statement of the Case

This is a direct appeal from the final order and judgment entered on October 9, 1975 by a district court of three judges constituted pursuant to 28 U.S.C. §§2281 and 2284. The final order and judgment declared unconstitutional and enjoined enforcement of three specific provisions of the New York Public Health Law—§§3331(6), 3332(2) and 3333(4)—"insofar as they require disclosure to the State of New York of the identity of patients receiving prescriptions for Schedule II controlled substances" (14a-17a at pars. 1, 2).* In addition, the judgment directed the destruction of New York prescription forms previously filed pursuant to the statute, the expungement of patients' names from records made from the prescription forms and the filing of an affidavit describing the time, place and manner of such destruction and expungement (14a-17a at pars. 3, 4). At the request of the State, a stay of the paragraphs of the judgment relating to destruction of the

* Numbers in parentheses preceding the letter "a" refer to pages of the appendix following appellant's Jurisdictional Statement herein.



records was granted by the three-judge court pending disposition of appellant's appeal or other order of this Court (16a at par. 5). The State's applications for a broader stay were denied by the Court of Appeals on October 20, 1975 and by Justice Marshall on October 28, 1975 (39a-43a).

*Roe, et al.* v. *Ingraham** was commenced on March 29, 1973 in the United States District Court for the Southern District of New York. On that date, the Court (Hon. Robert L. Carter, U.S.D.J.), granted an order temporarily restraining defendant from filing or processing prescription forms revealing the identity of patients receiving Schedule II drugs and from requiring pharmacists or physicians to file such forms and affirmatively directing defendant to retain any such prescription forms received by the State in a sealed vault or other equally secure place.

Subsequently, by an order and opinion rendered orally on April 6, 1973, the Court dismissed the complaint for want of a substantial federal question, but granted a temporary restraining order and dissolved the temporary restraining order previously granted. To permit plaintiffs to seek a stay and to perfect their appeal to the United States Court of Appeals, however, the District Court extended until April 9, 1973 at 12 noon so much of the order as provided for retention by defendant of the prescription forms in a sealed vault. The opinion, as subsequently filed, is reported as *Roe* v. *Ingraham,* 357 F.Supp. 1217 (S.D.N.Y. 1973).

On April 9, 1973, the Court of Appeals (Hon. J. Joseph Smith, Paul R. Hays and William H. Timbers, Circuit

* By order made October 2, 1975, Robert P. Whalen, the present Commissioner of Health of the State of New York, was substituted as defendant in place of his predecessor, Hollis S. Ingraham.

Judges) continued in effect the temporary restraining order, as modified, pending an appeal.

On May 24, 1973, the Court of Appeals (Hon. Henry J. Friendly, Chief Judge, Paul R. Hays, Circuit Judge and William J. Jameson, District Judge sitting by designation) reversed the District Court's order and held that the complaints stated a substantial federal constitutional question, that plaintiffs were entitled to a continuation of the temporary restraining order, that a three-judge court should be convened, and that the three-judge court should determine whether to grant a preliminary injunction. *Roe* v. *Ingraham,* 480 F.2d 102 (2d Cir. 1973). On August 23, 1973, the three-judge court (Hon. Wilfred Feinberg, Circuit Judge, Hon. Robert L. Carter, District Judge and Hon. Inzer B. Wyatt, District Judge) dissolved the temporary restraining order, denied plaintiffs' motion for a preliminary injunction, and denied defendant's cross-motion for an order dismissing the complaints. *Roe* v. *Ingraham,* 364 F.Supp. 536 (S.D.N.Y. 1973).

After pretrial discovery, the *Roe* and *Patient* actions were formally consolidated. In addition, two pretrial orders on consent governing the conduct of the trial were made. The first, made on November 18, 1974, set forth a stipulation of facts, the issues to be tried and the exhibits, witnesses and contentions upon which the parties would rely. The second, made on November 21, 1974, provided that the trial testimony of plaintiffs' expert witnesses and defendant's witnesses would be submitted to the Court in deposition form, and that the remainder of the trial would take place before the three-judge court. The trial and depositions were concluded on December 6, 1974.



On August 13, 1975, the three-judge court filed its unanimous opinion holding that "so much of the New York Health Law as requires reporting to state authorities in Albany the names and addresses of patients who receive Schedule II drugs as medication prescribed by duly licensed physicians is an unconstitutional interference with plaintiffs' right of privacy guaranteed under the Fourteenth Amendment" (13a).

The Court noted that "[a]n individual's physical ills and disabilities, the medication he takes, the frequency of his medical consultation are among the most sensitive of personal and psychological sensibilities" (10a); recognized that "there is legitimate concern that information that one, one's children or an intimate is under treatment with such drugs not be broadcast to unauthorized sources" (10a); stated that "the state effort to control drug abuse and to prevent illegal trafficking in dangerous drugs fosters a legitimate state purpose" (11a); found that "admittedly the only purpose this information [names, addresses and ages of patients receiving Schedule II drugs] serves is to identify individual patients who without using an alias go from doctor to doctor to secure Schedule II drugs and those individuals who secure more than a 30-day supply in a single month" and that "[d]uring the 20-month life of the program only one such unresolved incident in this category has been unearthed" (11a); and held that "[t]he diminution of a constitutionally guaranteed freedom is too great a price to pay for such a small constitutional yield" (11a).

On October 28, 1975, Hon. Justice Thurgood Marshall, having heard oral argument, denied appellant's motion for a stay of the provisions of the final order and judgment below granting declaratory and injunctive relief (39a-43a).

## Facts

*Roe, et al.* v. *Ingraham* was brought by four patients,* including three infants and one adult receiving medications set forth in Schedule II of §3306 of the New York Public Health Law (hereinafter "Schedule II drugs") (Tr. 5-6, 28, 61-2, 102-3; Compl., par. 4),** two named doctors who prescribe such drugs (Tr. 37-9, 75-6; Compl., par. 5), and The Empire State Physicians Guild, Inc., a New York Membership Corporation representing the interests of certain New York physicians (Tr. 76). *Patient, et al.* v. *Ingraham* was brought by a post-operative cancer patient and an individual suffering from migraine headaches, both of whom received Schedule II drugs as medication (Tr. 86-9, 31-4; Compl., par. 5), the doctor of one of these patients (Tr. 94-101; Compl., par. 6) and The American Federation of Physicians and Dentists (Compl., par. 7).

The gravamen of plaintiffs' claim was that certain provisions of Article 33 of the New York Public Health Law

* The State asserts that the patient plaintiffs are "anonymous" (Jurisdictional Statement, p. 7). This is incorrect. The identity of the patient plaintiffs was provided to defendant and the Court below and all plaintiffs testified in open court during the trial. To protect their privacy, however, the Court permitted such plaintiffs to prosecute the action under pseudonyms.

** Numbers or letters in parentheses preceded by "Tr." refer to pages of the transcript of the trial held on December 2, 1974; numbers preceded by the name of a witness (e.g., Wasserman 40) refer to pages of the deposition transcript of the trial testimony given on December 4, 5 and 6, 1974 pursuant to the November 21, 1974 Pretrial Order on Consent.

In addition, numbers preceded by "Ex." refer to trial exhibits and numbers preceded by "Stip., par." refer to paragraphs in the Stipulation of Facts included in the Pretrial Order on Consent made on November 18, 1974.



(hereinafter "Article 33" of "the Act") are unconstitutional insofar as they require physicians and pharmacists to file with the State of New York prescriptions revealing the identity of patients using Schedule II drugs. The challenged provisions require (a) that all Schedule II drugs be prescribed on prescription forms containing, *inter alia*, the name, address and age of the patient (§3332(2)) and (b) that copies of such prescription forms for Schedule II drugs, which in every case contain the identity of persons using the medication, must be sent to the Department of Health of the State of New York each and every time they are prescribed (§§3331(6) and 3333(4)).* Plaintiffs contended that the foregoing provisions violate the Fourteenth Amendment of the United States Constitution in that they unnecessarily invade the patient's right of privacy and the doctor's right to prescribe treatment for his patients solely on the basis of medical considerations.

The information acquired by the State is "coded" into a centralized computer and used in enforcement of Article 33. The Act contains no limitation on the sweeping requirement that copies of all prescriptions for Schedule II drugs (including thereon the names of the patients) must be filed.

* Contrary to the State's assertion (Jurisdictional Statement, p. 21), the Court below did not make the "strange" assumption "that the State had no interest in addicts." The Court held that "[t]here is no state claim that the names on the form will be of aid in preventing addicts from access to drugs by prescription" (11a, fn.). There never has been such a claim because the provisions challenged herein do not apply to addicts. Section 3331(1) specifically provides that the provisions of Title IV (which include the filing requirements) do not apply to the prescribing or dispensing of controlled substances to an "addict" or "habitual user", terms defined in §§3302(1) and 3302(17) respectively. Prescribing and dispensing of controlled substances to addicts are governed by Titles III and V of the Act.

There is no provision for any summons, either judicial or administrative, as the means whereby the Department of Health is required, in the usual case, to demand reports from doctors and pharmacists. The Department is required by the Act to demand and obtain such reports routinely, automatically, from all physicians and pharmacists in the State without any process whereby the physicians or pharmacists or patients may test in advance the reasonableness of the demand. Until entry of the final order and judgment below, approximately 125,000 prescriptions were received by the State and coded onto the computer each month by a staff of over 30 clerks and keypunch operators.

The legislative history of the Act* reveals that no consideration at all was given to the question whether there is any need for the filing and computerization of patients' names. Most of the legislative history is devoted to provisions of Article 220 of the Penal Law enacted together with Article 33 and to provisions of Article 33 not challenged hereby or relevant to this case. In the rare instances where the triplicate prescription provisions were discussed—principally on two pages of the 1972 Interim Report (Ex. 32, pp. 21-2) and the Hardt Memorandum (Ex. 33)—the discussion consisted of generalized and unsupported claims that they will assist in enforcement of the Act. Thus, the 1972 Interim Report states that the objects of the triplicate prescription provisions are to enable the Department of

* Hearings were held by the Temporary State Commission to Evaluate the Drug Laws which issued interim reports in 1971 (Ex. 31) and 1972 (Ex. 32, pp. 96-134). In addition, shortly prior to passage of the bill by the Legislature, Chester R. Hardt, Chairman of the Temporary State Commission, issued a memorandum (Ex. 33). It has been stipulated that, for purposes of this action, these three documents constitute the legislative history of the Act (Ex. 30).



Health "to compile data which will uncover irregularities such as forgeries, fraudulent obtaining of Schedule II substances, and theft of prescription blanks and their misuse by unauthorized persons" and to enable the Department to determine "if a patient has obtained prescriptions by going from doctor to doctor, or if stolen prescriptions are being used" and "where there has been an over-prescribing or over-dispensing of Schedule II drugs" (Ex. 32, p. 21). The Hardt Memorandum states that the triplicate prescription procedure is designed to reveal "physicians who have prescribed and dispensed a greater amount of a Schedule II substance than could possibly be justified by the nature of their practice" and "situations arising from lost or stolen prescriptions" (Ex. 33, p. 4).

The evidence in this case, as detailed below, shows that, to the extent they suggest that patients' names are needed, such claims are baseless; that over-prescription, over-dispensing of drugs and abuses resulting from thefts and forgeries of prescription blanks can all be detected equally well without centralized filing of patients' names; and that the sole remaining abuse cited, the obtaining of illicit amounts of drugs by going from "doctor to doctor" is minimal. These facts were not considered by the legislature. Indeed, the drafters of the Act never considered any of the following questions: whether accomplishment of the foregoing objectives could be achieved equally well without the patients' names; whether the patient's identity is actually required in any instance; and, if so, whether the abuse cited is sufficiently wide-spread to warrant the collection of data on 125,000 patients per month or 1.5 million prescriptions containing patients' names per year.

The answers to these questions (as contained in the evidence in this case) demonstrate the complete absence of any need for patients' names.

## ARGUMENT

**The Questions Raised by Appellant Are So Unsubstantial as Not to Warrant Further Argument.**

**1. *Plaintiffs Herein Clearly Have Standing to Sue.***

Preliminarily we note that the issue of standing—which now appears to be the principal ground upon which appellee seeks reversal of the decision below—was not even raised by appellee until the submission of post-trial briefs.

However, both the Court of Appeals when it directed that a three-judge court be convened and the three-judge court when it denied appellees' motion for a preliminary injunction clearly held that plaintiffs had standing to bring the instant action. Thus, the three-judge court stated (364 F.Supp. at 540, n.6):

"6. The physicians are not here merely asserting the rights of their patients but claim independent violations of protected constitutional rights. *Their standing to sue is established by Doe* v. *Bolton,* 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973). *See also, Roe* v. *Ingraham,* 480 F.2d 102 (2d Cir. 1973), at n. 5. Although it is unclear from the complaint, the Physicians Guild is apparently suing on behalf of its doctor members. Inasmuch as its claims are only repetitive, we may assume proper standing exists. Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958); Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925)" (emphasis added).



And Justice Marshall stated in denying the State's application for a stay: "Likewise, the court's conclusion that respondents had standing seems in accord with the liberal standing decisions of this Court" (43a).

Nor can it seriously be disputed that the physicians and the patients who are plaintiffs herein have the required "personal stake in the outcome of the controversy," *Baker* v. *Carr,* 369 U.S. 186, 204 (1962); and that there is a "logical nexus between the status asserted and the claim sought to be adjudicated," *Flast* v. *Cohen,* 392 U.S. 83, 95 (1968).

The present statute interferes with the freedom of the physician plaintiffs to practice medicine according to the highest medical standard, *Doe* v. *Bolton,* 410 U.S. 179, 199 (1973); *Nyberg* v. *City of Virginia,* 361 F.Supp. 932, 936 (D.Minn. 1973), aff'd 495 F.2d 1342 (8th Cir. 1974). Thus, the *Roe* complaint alleges that the statute "infringes on the doctor's right to prescribe treatment for his patients solely on the basis of medical considerations" (Compl., par. 11). And the uncontradicted record proof in this case is that a plaintiff psychiatrist terminated the use of Schedule II drugs which he deemed helpful to patients suffering from certain psychiatric disorders because the fears created by the filing requirement would undermine the patient's trust and confidence in the psychiatrist (Tr. 45-60, 49), and that it became impossible for several physician plaintiffs to use Schedule II drugs in treating patients who needed such drugs after patients learned of the filing requirements (Tr. 68-72, 77-8, 104-5).

A further basis for the standing of the physician plaintiffs is that the physician is the one against whom the license revocation sanctions of Article 33 operate if he pre-

scribes or dispenses Schedule II drugs without causing a prescription form containing the patient's name to be filed in Albany (§ 3390(2)). See *Doe* v. *Bolton,* 410 U.S. 179, 188-9 (1973); *Abele* v. *Markle,* 452 F.2d 1121 (2d Cir. 1971); *Nyberg* v. *City of Virginia,* 361 F.Supp. 932, 936 (D. Minn. 1973), *aff'd* 495 F.2d 1342 (8th Cir. 1974). Here, as in *Doe* v. *Bolton, supra,* there is, thus, a "sufficiently direct threat of personal detriment" (410 U.S. at 188).

The facts that the patient plaintiffs have not suffered economic injury and that many other persons are also injured do not deprive them of standing. *United States* v. *SCRAP,* 412 U.S. 669, 686 (1973). In the *SCRAP* case, the injury alleged was that the failure of the Interstate Commerce Commission to suspend a 2.5% rate increase might adversely affect plaintiffs' "use and enjoyment of the natural resources of the Washington area" (p. 687). This Court summarized the "attenuated line of causation to the eventual injury" alleged by plaintiffs as follows (p. 688):

> "Here the Court was asked to follow a far more attenuated line of causation to the eventual injury of which the appellees complained—a general rate increase would allegedly cause increased use of nonrecyclable commodities as compared to recyclable goods, thus resulting in the need to use more natural resources to produce such goods, some of which resources might be taken from the Washington area, and resulting in more refuse that might be discarded in national parks in the Washington area."

Nevertheless, this Court held that plaintiffs had standing and explained its earlier holding in *Sierra Club* v. *Morton,* 405 U.S. 727 (1972) as follows (at pp. 686-7):



> "Nor, we said, could the fact that many persons shared the same injury be sufficient reason to disqualify from seeking review of an agency's action any person who had in fact suffered injury. Rather, we explained: 'Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.' Id., at 734."

And further (p. 689, fn. 14):

> "The Government urges us to limit standing to those who have been 'significantly' affected by agency action. But, even if we could begin to define what such a test would mean, we think it fundamentally misconceived. 'Injury in fact' reflects the statutory requirement that a person be 'adversely affected' or 'aggrieved,' and it serves to distinguish a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem. We have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, see Baker v. Carr, 369 U.S. 186; a five-dollar fine and costs, see McGowan v. Maryland, 366 U.S. 420; and a $1.50 poll tax, Harper v. Virginia Bd. of Elections, 383 U.S. 663. While these cases were not dealing specifically with §702 of the APA, we see no reason to adopt a more restrictive interpretation of 'adversely affected' or 'aggrieved.' As Professor Davis has put it: 'The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation.' Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601, 613. See also K. Davis, Administrative Law Treatise §§22.09-5, 22.09-6 (Supp. 1970)."

Here, the patient plaintiffs are aggrieved in a direct, substantial and specific manner. Their right to private medical advice is not infringed by any "attenuated line of causation" such as the Court referred to in the *SCRAP* case. The challenged provisions of the Act, by requiring that a prescription form be filed with the State which contains, *inter alia,* the patient's name, address, age, medication and physician, clearly and directly invade the patient's privacy, causing the patient plaintiffs, all of whom are already in need of medical assistance, considerable additional stress and harm.

In *California Bankers Assn.* v. *Shultz,* 416 U.S. 21 (1974), a majority of this Court indicated that a broad requirement (such as the one at issue in the present case) of production of documents that "touch upon intimate areas of an individual's personal affairs" pursuant to a legislative scheme "which permits access to this information without invocation of the judicial process" would unconstitutionally invade the individual's privacy (416 U.S. at 78-79).

In *Shultz,* several individual bank customers (the "depositor plaintiffs"), banks (the "bank plaintiffs") and others contended that the delegation to the Secretary of the Treasury under the Bank Secrecy Act of broad authority to require reports of domestic monetary transactions from the financial institutions and parties involved was an unconstitutional invasion of privacy. Noting that despite the broad authority granted to the Secretary of the Treasury, the implementing regulations thereunder required only that the financial institution file a report on each domestic transaction in currency of more than $10,000 (31 C.F.R. §103.22), this Court held that the Act, as implemented by the regulations, did not unconstitutionally invade the bank plaintiffs' privacy (416 U.S. at 63-7).*



However, the concurring opinion of Mr. Justice Powell, with whom Mr. Justice Blackmun joined, made it clear that a majority of this Court (the two concurring and three dissenting justices**) would not have sanctioned the automatic production of large volumes of personal records without a summons or subpoena and without any showing of particularized need therefor.

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* The Court did not reach the question whether the depositor plaintiffs' privacy had been unconstitutionally infringed because there had been "no allegation by any of the individual depositors that they were engaged in the type of $10,000 domestic currency transaction which would necessitate that their bank report it to the government" (416 U.S. at 68). In this case, the allegations and proof were that every patient plaintiff except one used Schedule II drugs and thus prescriptions reflecting such use and his identity were being filed in Albany, and the one patient who no longer used Schedule II drugs had terminated such use rather than be subject to the filing requirements (Tr. 61-3).

** Justices Douglas and Marshall dissented in *Shultz* on the grounds, *inter alia,* that the domestic reporting provisions of the Bank Secrecy Act, even as narrowed by the regulations, constituted an invasion of privacy (see Douglas, J. at 416 U.S. at 87-91 and Marshall, J. at 93-99). Justice Brennan, who dissented on other grounds, found that "the reporting provisions are inseparable from —and in some cases considerably broader than—the record keeping requirements" (416 U.S. at 91) and did concur with the portions of Justice Douglas' opinion holding that the record keeping requirements violated the constitutional right of privacy (Douglas, J. at 416 U.S. at 79-86). Accordingly, we submit that it is fairly inferable that, at a minimum, Justice Brennan agreed with the concurring Justices that reporting requirements exceeding those embodied in the regulations promulgated under the Bank Secrecy Act would pose substantial and difficult constitutional questions.

In *Burrows* v. *Superior Court of San Bernardino County,* 118 Cal. Rptr. 166, 171 (1974), the California Supreme Court also concluded that the true meaning of *Shultz* was that it indicates that this Court will not uphold massive reporting requirements such as those authorized by but not implemented under the Bank Secrecy Act.

The concurring opinion stated (416 U.S. at 78-9):

> "The Act confers broad authority on the Secretary to require reports of domestic monetary transactions from the financial institutions and parties involved. 31 U.S.C. §§1081 and 1082. The only implementing regulations, however, require only that the financial institution 'file a report on each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a *transaction in currency of more than $10,000.*' 31 CFR §103.22 (italics added). As the Court properly recognizes, we must analyze plaintiffs' contentions in the context of the Act as narrowed by the regulations. *Ante,* at 64. From this perspective, I agree that the regulations do not constitute an impermissible infringement of any constitutional right.
>
> "A significant extension of the regulations' reporting requirements, however, would pose substantial and difficult constitutional questions for me. *In their full reach, the reports apparently authorized by the open-ended language of the Act touch upon intimate areas of an individual's personal affairs.* Financial transactions can reveal much about a person's activities, associations, and beliefs. *At some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy. Moreover, the potential for abuse is particularly acute where, as here, the legislative scheme permits access to this information without invocation of the judicial process.* In such instances, the important responsibility for balancing societal and individual interests is left to unreviewed executive discretion, rather than the scrutiny of a neutral magistrate. *United States* v. *U.S. District Court,* 407 U.S. 297, 316-317 (1972). As the issues are presently framed, however, I am in accord with the Court's disposition of the matter." (Emphasis added.)



The Act clearly touches upon "intimate areas of an individual's personal affairs." As Judge Friendly stated for the Second Circuit in reversing the order of dismissal of the District Court herein and directing that a three-judge court be convened (480 F.2d at 108, n. 7):

> "While the State correctly points out that the prescription form does not require a description of the illness, plaintiffs counter that, at least for some of the drugs in Schedule II, many members of the public know the ailments for which such drugs are commonly prescribed. To take perhaps the most obvious example, most informed people would associate large dosages of Demerol with an ailment causing serious pain. It is immaterial that the ailment usually is not one that should arouse any emotion toward the victim save sympathy; most people simply do not want their ailments to be generally known."

Similarly, this Court has held that included within the right of privacy is the right of anonymity. *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449 (1958); *Talley* v. *California,* 362 U.S. 60 (1960); *Bates* v. *City of Little Rock,* 361 U.S. 516 (1960).

At the trial of this action, several patients indicated that the prospect of having their illnesses "generally known" by having them on file at a centralized state agency caused them acute discomfort and embarrassment. A post-operative cancer patient receiving Percodan to relieve his pain, first tried non-Schedule II drugs as substitutes (G. Patient 87) and when they did not yield satisfactory results, he obtained the required medicine in New Jersey where the information would not be put on a state-run computer (G. Patient 88). Another plaintiff, disregarding her doctor's advice, would not permit her son, who suffered from acute hyperkinesis, to continue receiving prescriptions for a Schedule II drug

after she learned that the prescription therefor, containing his identity, would be placed on the State's computer in Albany (Doe 61-3). Similarly, it hardly seems necessary to suggest that patients who suffer from ocular gyro-crises (involuntary upward rolling of the eyes; Tr. 28, 49-50) are distraught at the prospect of the centralized and easy access to information about their treatment. And all the other plaintiffs made it unmistakeably clear that they "simply do not want" information describing prescriptions which they or their children are required to take for entirely legitimate medical reasons to be filed with and computerized by the State (Moe 5-28; Poe 28-31; Martha Patient 31-36; Roe 102-3).*

Under these circumstances, we submit, the Court below was clearly correct in holding that plaintiffs herein had standing to sue.

**2. *There Is No "Constitutionally Justifiable Pertinence" (410 U.S. at 197) for the State Statute Requiring Filing of Names of Patients Receiving Schedule II Drugs.***

The fundamental nature of the constitutional guarantee against invasion of privacy has been underscored by this Court's decisions in *Roe* v. *Wade,* 410 U.S. 113 (1973), *Doe* v. *Bolton,* 410 U.S. 179 (1973), and *California Bankers Assn.* v. *Shultz, supra.*

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* For example, Mr. Moe testified that several physicians had advised him and his wife that their son "would have to take something like Ritalin for him to have any hope of having a normal childhood and learning" (Tr. 7) and his fear that "by the time my boy is an active citizen, there will be a long file on him in a narcotics or dangerous drug context, in which somebody can get a print-out and use it, once they have it, for whatever they use it for" (Tr. 14).



In *Roe* v. *Wade, supra,* this Court considered a Texas statute making it a crime to procure or attempt an abortion except "an abortion procured or attempted by medical advice for the purpose of saving the life of the mother" (410 U.S. at 118). The Court held that the statute violated the guarantee of privacy in the Due Process Clause of the Fourteenth Amendment to the extent that it unnecessarily restricted a woman's qualified right to terminate her pregnancy.

In setting forth the fundamental nature of the right of privacy, the Court stated (410 U.S. at 152-3):

> "The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts the Court or individual Justices have indeed found at least the roots of that right in the First Amendment . . . ; in the Fourth and Fifth Amendments . . . ; in the penumbras of the Bill of Rights . . . ; in the Ninth Amendment . . . ; or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment . . . . These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' . . . are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage . . . , procreation . . . , contraception . . . , family relationships . . . , and child rearing and education . . . ." [Citations omitted.]

After noting that the right of privacy is "founded in the Fourteenth Amendment's concept of personal liberty" (410 U.S. at 153), the Court further held that an invasion of the

fundamental right of privacy can only be justified by a compelling state interest (410 U.S. at 155-6):

> "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' *Kramer* v. *Union Free School District,* 395 U.S. 621, 627 (1969); *Shapiro* v. *Thompson,* 394 U.S. 618, 634 (1969), *Sherbert* v. *Verner,* 374 U.S. 398, 406 (1963), and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake. *Griswold* v. *Connecticut,* 381 U.S. at 485; *Aptheker* v. *Secretary of State,* 378 U.S. 500, 508 (1964); *Cantwell* v. *Connecticut,* 310 U.S. 296, 307-308 (1940); see *Eisenstadt* v. *Baird,* 405 U.S. at 460, 463-464 (White, J., concurring in result).
>
> "In the recent abortion cases, cited above, courts have recognized these principles. Those striking down state laws have generally scrutinized the State's interest in protecting health and potential life, and have concluded that neither interest justified broad limitations on the reasons for which a physician and his pregnant patient might decide that she should have an abortion in the early stages of pregnancy. Courts sustaining state laws have held that the State's determinations to protect health or prenatal life are dominant and constitutionally justifiable."

Noting that "the medical data indicating that abortion in early pregnancy, that is, prior to the end of the first trimester, although not without its risk, is now relatively safe" (410 U.S. at 149) and indeed "until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth" (410 U.S. at 163), this Court concluded that the State's interest in preservation and protection of maternal health was not sufficiently compelling to warrant interference of the State with the decision by



the attending physician, in consultation with his patient, that the patient's pregnancy should be terminated.

In *Doe* v. *Bolton, supra,* this Court considered three procedural conditions precedent to an authorized abortion set forth in a Georgia statute. They were (1) that the abortion be performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals; (2) that the procedure be approv[illegible] by the Hospital Staff Abortion Committee; and (3) that the performing physician's judgment be confirmed by the independent examinations of the patient by two other licensed physicians. The Court held that these provisions violated the Fourteenth Amendment because there was no "constitutionally justifiable pertinence" of the foregoing statutory requirements to the State's interest in protecting maternal health.

Thus, in holding that the interposition of the hospital abortion committee was unduly restrictive of the patient's right to privacy, the Court stated (p. 197):

> "Viewing the Georgia statute as a whole, *we see no constitutionally justifiable pertinence in the structure for the advance approval by the abortion committee.* With regard to the protection of potential life, the medical judgment is already completed prior to the committee stage, and review by a committee once removed from diagnosis is basically redundant. We are not cited to any other surgical procedure made subject to committee approval as a matter of state criminal law. The woman's right to receive medical care in accordance with her licensed physician's best judgment and the physician's right to administer it are substantially limited by this statutorily imposed overview." (Emphasis added.)

Appellant urges that "[t]he need for filing and patient identity was determined by the legislature" and suggests

that the Court below held that the problem of drug abuse was "beyond the power of the legislature to address itself to" (Jurisdictional Statement, pp. 16, 17). The contention is invalid and the suggestion incorrect. A legislative determination of "need" cannot immunize a statute from being held unconstitutional. As this Court stated in *Kedroff* v. *St. Nicholas Cathedral,* 344 U.S. 94, 106-107 (1952): "Certainly a legislature is free to act upon such information as it may have as to the necessity for legislation. But an enactment by a legislature cannot validate action which the Constitution prohibits, and we think the statute here in question passes the constitutional limits." Accord: *Harman* v. *Forssenius,* 380 U.S. 528, 542-543 (1965); *American Communic. Ass'n.* v. *Douds,* 339 U.S. 382, 400 (1950); *Doe* v. *Bolton, supra* at 197.

Nor did the Court below hold that the problem of drug abuse was beyond the power of the legislature to address itself to. The holding of the three-judge court herein that the statutory requirement of centralized patient name filing is unconstitutional was based upon its findings that the State's interest in controlling drug abuse was not served in any significant respect by the challenged provisions. Thus, the Court stated (11a):

> "Concededly the state effort to control drug abuse and to prevent illicit trafficking in dangerous drugs fosters a legitimate state purpose, and ordinarily we would be reluctant to interfere. The regulatory scheme, however, has a needlessly broad sweep. The state prescription form program provides for issuing serially numbered prescription forms to physicians. Each doctor prescribing and each pharmacist dispensing any Schedule II drugs are given a DEA number. They, therefore, are readily identifiable. The state can promptly determine the quantity of drugs prescribed and dispensed by particular physicians and pharmacists. Over-prescribing or dispensing, forgeries and thefts can be detected. Having the name of the person receiving the drugs on the state's form adds nothing. Indeed, admittedly the only purpose this information serves is to identify individual patients who without using an alias go from doctor to doctor to secure Schedule II drugs and those individuals who secure more than a 30-day supply in any single month. During the 20-month life of the program only one such unresolved incident in this category had been unearthed. The diminution of a constitutionally guaranteed freedom is too great a price to pay for such a small governmental yield." (Footnote omitted.)



The record herein fully supports the above findings and demonstrates that the State cannot point to *any* enforcement purpose that will be served by having patients' names recorded on the prescriptions and on the central computer in Albany and that the purposes for which Article 33 was enacted would be served equally well by legislation providing for the filing of the prescription without the patient's name.

For example, evidence adduced at the trial herein showed that printouts now being produced by the system enable the Department of Health to ascertain the average amount of each Schedule II controlled substance that is prescribed per physician (Ex. 14) and enable the State to go directly to those doctors who prescribe substantially more than the average to determine if there is a *bona fide* medical reason therefor (Cannizzaro 140-43). Another printout shows lost or stolen prescription blanks which have been cashed (Ex. G; Cannizzaro 143-4). Other printouts such as those showing two prescriptions with the same number and incorrect DEA numbers for doctors help detect forgeries (Ex. 16;

Cannizzaro 146-47). In addition, other printouts set forth the volume and frequency of the use of various drugs (Ex. 15; Cannizzaro 144-46).

None of the above printouts contains patient names. None of the legitimate and beneficial purposes of Article 33 served by these printouts are affected by the holding that the provisions of Article 33 requiring centralized filing of patients' names violate the Due Process Clause of the Fourteenth Amendment.

The principal claim of need for the statute has always been that the patient identification provisions are needed to investigate three categories of violations. When this case was before the Second Circuit, Judge Friendly summarized defendant's contentions and set forth the three categories as follows (480 F.2d at 108):

> "New York has advanced powerful arguments in support of the requirement of central filing of prescriptions for Schedule II drugs. The *most important* are that only by such filing, now complemented by the computer's ability to answer appropriate inquiries, can the State readily detect a number of serious abuses —the same patient going from doctor to doctor and thereby obtaining quantities of Schedule II drugs greater than his legitimate medical needs; overprescription by doctors; and the theft or forgery of prescriptions." (Emphasis added.)

On remand, the three-judge court denied the motion for a preliminary injunction and held that the issue of need was the "critical question" of this case (364 F.Supp. at 546):

> "The critical question is whether the objective which the regulation seeks to accomplish is necessitated by



> a subordinating state interest justifying the degree and consequences of the resulting personal intrusion."

Accordingly, it directed plaintiffs to "submit the necessary intensive and detailed analysis of the interests of the state and the individual", including specifically a demonstration "that the computerization of names is not necessary for the accomplishment of the state's goals (364 F.Supp. at 546).

Not only did plaintiffs submit such an analysis but the State *withdrew* its argument (previously cited to the Court of Appeals and the three-judge Court as the *raison d'etre* for the challenged provisions) that patients' names are required to detect the alleged "abuses" sought to be controlled by the Act.

Thus, in the Stipulation of Facts herein (based upon extensive prior discovery) the State conceded that its sole "need" for patients' names was to aid in detecting cases of persons who had gone "from doctor to doctor" to obtain excessive amounts of a Schedule II drug. Moreover, the State conceded, the patient's name is only of use if, going from doctor to doctor, the patient uses the same name. Thus, the State stipulated as follows (par. 12):

> "The only information from the computer which Dr. Baker [Associate Commissioner of the New York State Department of Health and the person charged with over-all responsibility for the triplicate prescription program] contemplates would contain the names of any patients is a print-out of patients who have obtained more than a 30-day supply of a Schedule II drug in a 30-day period. The only reason given by Dr. Baker for the above print-out is that it will assist in the identification and investigation of persons who,

*using the same name,* go from doctor to doctor to obtain an illicit supply of Schedule II drugs" (emphasis added).

In addition, Dr. Arthur G. Baker so testified in this case (Ex. 37, p. 139):

> "Q. Really we come back to what we said before, and that is the only reason why you have requested that the patient's name be put on the computer is to detect patients who go from doctor to doctor in order to obtain an excessive amount of a particular drug.
> A. That's correct."

Thus, in arguing to this Court that the decision below "ignored the use of filed prescriptions containing patient identity in checking on forgeries and raised prescriptions" (Jurisdictional Statement, p. 17),* the State has conveniently forgotten the evidence in this case summarized above including the above-quoted testimony of Dr. Baker and its own Stipulation in this case. The fact is that by the time of the trial herein, the State had (a) withdrawn the arguments made to the Second Circuit that the patient-identification provisions are needed to detect "over-prescriptions," "thefts," and "forgeries," (b) conceded that it did *not* need patients' names to solve any of those prob-

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* The further suggestion that filed patients' names are of use "in disciplinary proceedings" (Jurisdictional Statement, p. 17) was not made to the Court of Appeals or to the three-judge court below, and is totally devoid of record support. In addition, it makes no sense. Disciplinary proceedings are taken against doctors, not patients. As the system presently operates (i.e., after the decision of the court below), the prescriptions are still filed but with the patient's name deleted. Thus, the doctors' and pharmacists' names still appear on the prescription filed in Albany and, if the names of particular patients are required, they can be obtained from the pharmacist who filled the prescription and/or from the file of the doctor himself.



lems and (c) stipulated that the only need for patients' names was to aid in detecting instances of the so-called "doctor to doctor" situation alluded to by the Court of Appeals (Stip., par. 12). These concessions were based, *inter alia,* on the testimony of Dr. Baker that patients' names on the computer would not assist in detecting forgeries or raised prescriptions or thefts because the patient information on such prescriptions would be erroneous anyway (Ex. 37, pp. 118-21, 126-29). This evidence formed the basis for the conclusion of the three-judge court quoted above (*supra,* pp. 22-23).

In addition to the inherent improbability of persons going from doctor to doctor using their own names to obtain illegal amounts of drugs, there was overwhelming proof that the so-called problem of persons going from "doctor to doctor" was spurious. Thus, the State stipulated that from January 1, 1969 to the time of its most recent information there had been only four case reports of "doctor to doctor" type violations (Stip., par. 12), distributed as follows:

1974 — 1 case
1973 — None
1972 — None
1971 — 1 case
1970 — 1 case
1969 — 1 case

Indeed, although the State's Trial Memorandum stated that Mr. Cannizzaro, the state official in charge of processing the triplicate prescriptions, would testify "that the computer indicates that there are hundreds of persons, using the same name, receiving Schedule II drugs from more than one doctor, i.e., shopping" (Deft's Trial Memo., p. 10), there was in fact no such testimony and no evidence

that additional cases of patients going from doctor to doctor were referred to The Bureau of Narcotic Control. On the contrary, Cannizzaro testified that he had no knowledge of a single prosecution or arrest of a person shown by the computer to have obtained an illicit supply of Schedule II drugs by going "from doctor to doctor" (Cannizzaro 79-80).

Moreover, from the time of the inception of the system to the time of trial—a period variously put at twenty months (11a) and fifteen months (Jurisdictional Statement, p. 14)—there were only two reported cases involving a potential "doctor to doctor" problem. One investigation disclosed a *bona fide* patient relationship and the other was still pending at the time of trial (Stip., par. 15).

Finally, neither the Federal government in the Federal Drug Abuse Control Act (21 U.S.C. §§ 801 *et seq.*), the Commissioners on Uniform State Law in the Uniform Controlled Substances Act or the legislatures of 36 of the 40 states which have enacted statutes based on the Uniform Act found it "necessary" to require that the names of patients receiving Schedule II drugs be filed with a centralized agency.* The absence of provisions in parallel statutes by other legislatures has often been recognized as a prime factor indicating lack of need for such provisions. See e.g., *Doe* v. *Bolton, supra* at 194; *Harman* v. *Forssenius,* 380 U.S. 528, 542-543 (1965).

Defendant has argued at length that "defendant always had access to prescriptions, even before the passage of the statute involved" (Jurisdictional Statement, p. 13) and that plaintiffs "conceded . . . the constitutionality of the

* The statutes referred to are set forth in Appendix A to the memorandum filed by Appellees Roe, et al. in oposition to the stay for which the State applied to Mr. Justice Marshall.



prior law which allowed access to prescriptions by defendant's enforcement agents" (Jurisdictional Statement, p. 18).

Plaintiffs herein do not contend that the retention by a pharmacist of a copy of a prescription for a statutory period such as five years is an unreasonable diminution of their expectation of privacy. Plaintiffs neither concede nor reach the question whether prior New York State law (which apparently permitted a state investigator to obtain access to such documents without a warrant) was constitutional.* But we do submit that there is a world of difference between permitting an inspector access to records in the course of an investigation and requiring all pharmacies and doctors to turn over all such information *automatically* to the State. The old system was, by its very nature, a guarantee of reasonable privacy. The automatic collection of vast volumes of personal data by a centralized state agency obviously creates a far greater likelihood of invasion of privacy. One breach of security results in exposure of private information as to *all* listed patients. There was substantial and uncontradicted evidence before the Court below that the security of the State's computer facility was totally inadequate and that there was a substantial risk of unauthorized disclosure of the triplicate prescription information maintained there (Wasserman 1-65).

* As indicated by *California Bankers Assn.* v. *Shultz, supra; Burrows* v. *Superior Court of San Bernardino County, supra; Camara* v. *Municipal Court,* 387 U.S. 523 (1967); *See* v. *City of Seattle,* 387 U.S. 541 (1967); *Collonade Catering Corp.* v. *United States,* 397 U.S. 72 (1970); and *United States* v. *Bissell,* 406 U.S. 311 (1972), this is a substantial and difficult question which plaintiffs never intended to "concede" as the Court below suggested in its earlier opinion (see 364 F.Supp. at 544) and defendant continues to urge to this Court (Jurisdictional Statement, p. 18).

The Court below recognized that the development of modern methods of computerization of records, affording state investigators instant access to enormous volumes of personal information, poses a new and greater threat to privacy with which the courts must keep pace (12a). As the California Supreme Court observed in *Burrows* v. *Superior Court of San Bernardino County,* 118 Cal.Rptr. 166, 171 (1974):

> "Cases are legion that condemn violent searches and invasions of an individual's right to the privacy of his dwelling. The imposition upon privacy, although perhaps not so dramatic, may be equally devastating when other methods are employed. Development of photocopying machines, electronic computers and other sophisticated instruments have accelerated the ability of governments to intrude into areas which a person normally chooses to exclude from prying eyes and inquisitive minds. Consequently judicial interpretations of the reach of the constitutional protection of individual privacy must keep pace with the perils created by these new devices.[4]

[4] Back in 1890, Samuel Warren and Louis Brandeis, in their celebrated article, The Right to Privacy (4 Harv.L.Rev. 193, 195) foresaw this problem. They wrote: 'Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right "to be let alone." Instantaneous photographs and newspaper enterprises have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that what is whispered in the closet shall be proclaimed from the house-tops.' (Fn. omitted.)"

More "efficient" and therefore more threatening intrusions into privacy have already been subjected to greater constitutional restraints. For example, evidence obtained



by warrantless bugging is inadmissible (*Katz* v. *United States,* 389 U.S. 347 (1967)) while evidence obtained by warrantless listening outside an apartment door is admissible. *United States* v. *Ortega,* 471 F.2d 1350, 1361 (2d Cir. 1972), *cert. denied* 411 U.S. 948 (1973).

Moreover, because the records are obtained automatically without even a request by a state agent or the issuance of a warrant by a court, the present statute is particularly threatening. Unlike the Bank Secrecy Act at issue in *Shultz,* the filing provisions of the New York Public Health Law are "self-executing" (cf. 416 U.S. at 64). In *Shultz,* as this Court pointed out, the records "were to be available only by normal legal process . . . ." (416 U.S. at 54.) In sharp contrast, under the Act here challenged (1) there is no requirement that an administrative summons, subpoena or warrant be issued nor (2) must the records turned over be claimed to be relevant and material to a specific matter then under inquiry nor (3) is inspection by the State limited to a small number of persons. The Act explicitly provides that huge volumes of personal records be turned over *automatically* by every doctor and pharmacist in the State who prescribes or dispenses Schedule II medications.

## CONCLUSION

The State has failed to demonstrate any need ("compelling" or otherwise) which justifies its system of continued monitoring of persons who take Schedule II drugs under the supervision of licensed physicians, for no reason other than to relieve pain and mitigate the effects of serious disease. On the contrary, the uncontradicted record proof in this case shows that the centralized collection of patients' names is not necessary or even appropriate to detect over-prescribing physicians, over-dispensing pharmacists or individuals who forge or steal prescription blanks. And as to individuals who supposedly go from "doctor to doctor" to obtain excessive amounts of Schedule II drugs (which persons, the State continues to assert, its system will aid in detecting), the record proof is also uncontradicted that such cases have been utterly insignificant historically (4 cases in the 7 years prior to trial) and have continued to be *de minimis* since institution of the present system (2 case reports referred for investigation).

We submit that Article 33's filing provisions violate the reasonable expectations of thousands of citizens that they may keep to themselves the nature of their treatment and illnesses and may maintain the confidentiality of communications with their physicians. There is and can be no reasonable basis for suspecting the overwhelming majority of persons utilizing Schedule II drugs or for prying into their personal affairs. The suggestion that the State has a security system which will preserve the confidentiality of such information is belied by the evidence in this case as well as by the innumerable examples of leaks of supposedly confidential information at all levels of our government.



We urge that the State's system is a totally unjustified intrusion into what Justice Brandeis described in his dissent in *Olmstead* v. *United States,* 277 U.S. 438, 478 (1928), as "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."

For the reasons set forth above and based upon the evidence adduced at trial, appellees submit that this Court should affirm the final order and judgment of the Court below permanently enjoining enforcement of, and declaring unconstitutional, those provisions of Article 33 of the New York Public Health Law which require physicians to record the identity of their patients on copies of prescription forms filed with the State.

Respectfully submitted,

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